

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THOMAS FERNANDEZ, LORA SMITH, and
TOSHA THOMAS, individually and on
behalf of a class of all other
persons similarly situated,

Plaintiffs,

v.

K-M INDUSTRIES HOLDING CO., INC., et
al.,

Defendants.

No. C 06-7339 CW

ORDER GRANTING
PLAINTIFFS' MOTION
FOR CLASS
CERTIFICATION AND
APPOINTMENT OF
CLASS COUNSEL

Plaintiffs Thomas Fernandez, Lora Smith and Tosha Thomas move for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Defendants K-M Industries Holding Co., Inc. (KMH), et al. oppose the motion. The matter was taken under submission on the papers. Having considered all of the papers submitted by the parties, the Court grants Plaintiffs' motion.

BACKGROUND

The following facts are alleged in the complaint. Plaintiffs are former employees of either Kelly-Moore Paint Company or Capital

1 Insurance Group (CIG), both of which are wholly owned by KMH.
2 Before 1998, KMH was owned by William Moore and his family through
3 a trust (the Moore Trust). In 1998, Mr. Moore established a stock
4 ownership plan for employees of Kelly-Moore and CIG. In 1998 and
5 1999, the Employee Stock Ownership Plan (ESOP) paid \$287 million to
6 the Moore Trust to purchase KMH stock. Mr. Moore represented both
7 the ESOP and the Moore Trust in these transactions.

8 Plaintiffs are participants in the ESOP. They allege that the
9 ESOP transactions were prohibited under the Employee Retirement
10 Income Security Act (ERISA) because Mr. Moore acted as both the
11 buyer and seller. Because these were prohibited transactions,
12 Plaintiffs argue, Defendants must show that the ESOP paid fair
13 market value for the shares in order to avoid liability under
14 ERISA. Plaintiffs maintain that, in fact, the ESOP bought the
15 shares for more than they were worth. This was in large part due
16 to the failure of plan fiduciaries to provide complete and accurate
17 information about KMH -- in particular, information about Kelly-
18 Moore's exposure to liability from asbestos litigation -- to
19 valuation experts. Plaintiffs claim that the fiduciaries then
20 unjustifiably relied on the reports of those valuation experts when
21 determining the worth of KMH stock. Plaintiffs therefore charge
22 Defendants KMH, the KMH ESOP Plan Committee and the CIG ESOP Plan
23 Committee, which they allege are fiduciaries of the ESOP, with
24 violating their fiduciary duties under ERISA.¹

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26 ¹Defendant North Star Trust Co. became the ESOP trustee in
27 2003. Plaintiffs charge North Star with breaching its fiduciary
28 duties by failing to make an adequate investigation into the
alleged prior breaches by other Defendants and by failing to take

1 Plaintiffs now ask the Court to certify a class of all persons
2 who were participants in or beneficiaries of the ESOP on October
3 13, 1998 or at any time thereafter.

4 LEGAL STANDARD

5 Plaintiffs seeking to represent a class must satisfy the
6 threshold requirements of Rule 23(a) as well as the requirements
7 for certification under one of the subsections of Rule 23(b). Rule
8 23(a) provides that a case is appropriate for certification as a
9 class action if: "(1) the class is so numerous that joinder of all
10 members is impracticable; (2) there are questions of law or fact
11 common to the class; (3) the claims or defenses of the
12 representative parties are typical of the claims or defenses of the
13 class; and (4) the representative parties will fairly and
14 adequately protect the interests of the class." Fed. R. Civ. P.
15 23(a). Rule 23(b) further provides that a case may may be
16 certified as a class action only if one of the following is true:

17 (1) prosecuting separate actions by or against individual
18 class members would create a risk of:

19 (A) inconsistent or varying adjudications with
20 respect to individual class members that would
21 establish incompatible standards of conduct for the
22 party opposing the class; or

23 (B) adjudications with respect to individual class
24 members that, as a practical matter, would be
25 dispositive of the interests of the other members
26 not parties to the individual adjudications or would
27 substantially impair or impede their ability to
28 protect their interests;

(2) the party opposing the class has acted or refused to
act on grounds that apply generally to the class, so that
final injunctive relief or corresponding declaratory

reasonable steps to remedy such breaches.

1 relief is appropriate respecting the class as a whole; or

2 (3) the court finds that the questions of law or fact
3 common to class members predominate over any questions
4 affecting only individual members, and that a class
5 action is superior to other available methods for fairly
6 and efficiently adjudicating the controversy. The
7 matters pertinent to these findings include:

8 (A) the class members' interests in individually
9 controlling the prosecution or defense of separate
10 actions;

11 (B) the extent and nature of any litigation
12 concerning the controversy already begun by or
13 against class members;

14 (C) the desirability or undesirability of
15 concentrating the litigation of the claims in the
16 particular forum; and

17 (D) the likely difficulties in managing a class
18 action.

19 Fed. R. Civ. P. 23(b).

20 A plaintiff seeking class certification bears the burden of
21 demonstrating that each element of Rule 23 is satisfied, and a
22 district court may certify a class only if it determines that the
23 plaintiff has borne her burden. General Tel. Co. v. Falcon, 457
24 U.S. 147, 158-61 (1982); Doninger v. Pac. Nw. Bell, Inc., 564 F.2d
25 1304, 1308 (9th Cir. 1977). In making this determination, the
26 court may not consider the merits of the plaintiff's claims.
27 Burkhalter Travel Agency v. MacFarms Int'l, Inc., 141 F.R.D. 144,
28 152 (N.D. Cal. 1991). Rather, the court must take the substantive
allegations of the complaint as true. Blackie v. Barrack, 524 F.2d
891, 901 (9th Cir. 1975). Nevertheless, the court need not accept
conclusory or generic allegations regarding the suitability of the
litigation for resolution through class action. Burkhalter, 141
F.R.D. at 152. In addition, the court may consider supplemental

1 evidentiary submissions of the parties. In re Methionine Antitrust
2 Litig., 204 F.R.D. 161, 163 (N.D. Cal. 2001); see also Moore v.
3 Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983) (noting
4 that "some inquiry into the substance of a case may be necessary to
5 ascertain satisfaction of the commonality and typicality
6 requirements of Rule 23(a)"; however, "it is improper to advance a
7 decision on the merits at the class certification stage").
8 Ultimately, it is in the district court's discretion whether a
9 class should be certified. Burkhalter, 141 F.R.D. at 152.

10 DISCUSSION

11 I. Class Certification

12 As a preliminary matter, Defendants do not dispute Plaintiffs'
13 assertion that this action satisfies the numerosity, commonality
14 and typicality requirements of Rule 23(a)(1), (2) and (3), and the
15 Court finds that it does. The Court also agrees with Plaintiffs'
16 undisputed assertion that this case satisfies the requirements of
17 either Rule 23(b)(1) or (2). Defendants' opposition to class
18 certification is based on a single argument: that Plaintiffs will
19 not fairly and adequately protect the interests of the class, as
20 required by Rule 23(a)(4). Specifically, Defendants claim that
21 Plaintiffs have little knowledge or understanding of the claims
22 they are asserting, and are not interested or engaged in this
23 litigation. They therefore argue that class certification is not
24 appropriate.

25 "The threshold of knowledge required to qualify a class
26 representative is low." Moeller v. Taco Bell Corp., 220 F.R.D.
27 604, 611 (N.D. Cal. 2004) (citing Burkhalter, 141 F.R.D. at

1 153-54). While a class representative must "understand the
2 gravamen" of her claims, it is not necessary that she be
3 "intimately familiar with every factual and legal issue in the
4 case." Id. (citing In re Worlds of Wonder Sec. Litig., 1990 WL
5 61951, at *3 (N.D. Cal.)). Thus, a class representative "will be
6 deemed inadequate only if she is 'startlingly unfamiliar' with the
7 case." Id. (quoting Greenspan v. Brassler, 78 F.R.D. 130, 133-34
8 (S.D.N.Y. 1978)). "Those courts that have found representatives
9 inadequate have done so because the plaintiffs knew nothing about
10 the case and completely relied on counsel to direct the
11 litigation." Id. (citing Welling v. Alexy, 155 F.R.D. 654, 659
12 (N.D. Cal. 1994) (finding the plaintiff inadequate because he
13 showed a "complete lack of interest in the conduct of the case")),
14 and Koenig v. Benson, 117 F.R.D. 330, 337 (E.D.N.Y. 1987) (finding
15 the plaintiff inadequate because of an "alarming unfamiliarity"
16 with the lawsuit)).

17 Defendants have pointed to some deposition testimony
18 suggesting that Plaintiffs do not fully understand the basis of
19 their claims. However, in a complex ERISA case such as this one,
20 where the alleged violations are inseparable from the
21 technicalities of securities transactions and corporate valuation,
22 it is neither fair nor realistic to expect non-attorney class
23 representatives to be able to articulate the precise legal theories
24 underlying their claims. See Williams Corp. v. Kaiser Sand &
25 Gravel Co., Inc., 146 F.R.D. 185, 188 (N.D. Cal. 1992) ("In complex
26 litigation, a class representative need not have first hand
27 knowledge of all of the details of his or her suit."). If class
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1 representatives were held to such unreasonable expectations, ERISA
2 class actions would become "a device usable only by individuals
3 with such a degree of sophistication that they would be capable of
4 acting as their own attorneys." Kaplan v. Pomerantz, 131 F.R.D.
5 118, 122 (N.D. Ill. 1990). Nor is it worrisome that Plaintiffs may
6 not have recognized the legal basis for their claims until after
7 bringing their concerns to the attention of counsel. "A complex
8 securities action cannot be founded upon an investigation of a
9 litigant. The reality of complex cases of this type is that
10 clients must defer a great amount of discretion to their lawyers."
11 Worlds of Wonder, 1990 WL 61951, at *3 (internal quotation marks
12 and citation omitted).

13 It is clear from Plaintiffs' deposition testimony that they
14 understand the gravamen of the complaint: that there were
15 improprieties having to do with the management of the ESOP. For
16 example, when asked the question, "Can you explain to me the
17 reasons that you filed this lawsuit?" Mr. Fernandez stated, "Well,
18 I felt that the obligations of K-M Industries, I guess, the parent
19 company, in regards to the outstanding amount of the asbestos
20 lawsuits weren't really properly taken into effect when the ESOP
21 was created -- or taken into account." Wasow Dec. Ex. 1 at 172.
22 Similarly, Ms. Smith stated that she had been unaware that the
23 value of her stock could be impacted by asbestos litigation. Id.
24 Ex. 2 at 55-56. Ms. Thomas, when asked if she had "any problem
25 with the way the shares in Kelly-Moore were valued," stated, "Yes.
26 . . . That there was too much paid into the plan." Id. Ex. 3 at
27 65. While these explanations of the legal bases of this action may
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1 not be as eloquent as counsel's, they do not reveal an "alarming
2 unfamiliarity" with the lawsuit. In addition, although Defendants
3 portray Plaintiffs as disinterested in the substance of their
4 claims and unengaged in the litigation, the Court finds scant
5 support for such characterizations in the deposition excerpts
6 submitted by the parties.

7 Defendants also suggest that Ms. Smith and Ms. Thomas may be
8 upset with their former employers for conduct unrelated to the
9 transactions at issue, and thus may have ulterior motives for
10 pursuing this lawsuit. For instance, Ms. Thomas testified at her
11 deposition that she left Kelly-Moore because she felt she was
12 subjected to discrimination and a hostile work environment. Ms.
13 Smith testified that she believed she had been treated unfairly
14 because she was first told she would be able to redeem her ESOP
15 shares in 2007, but was later told she would not be able to redeem
16 them until 2014. Notwithstanding these possible tangential
17 disputes, Defendants have not produced evidence of anything
18 resembling "vindictiveness to such an extent that these plaintiffs
19 cannot adequately represent the class." Kayes v. Pac. Lumber Co.,
20 51 F.3d 1449, 1464 (9th Cir. 1995). Therefore, there is no basis
21 for concluding that Plaintiffs' goals in pursuing their claims are
22 contrary to the interests of other class members.

23 Despite the concerns Defendants have raised, they have not
24 charged Plaintiffs or their counsel with failing to prosecute this
25 action diligently. Plaintiffs stated at their depositions that
26 they are aware of their responsibilities as class representatives,
27 and they have shown thus far that they are capable of fulfilling
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1 those responsibilities. Defendants have provided no reason to
2 doubt that they will continue to do so. Accordingly, the Court
3 finds that the requirements of Rule 23(a)(4) have been satisfied.

4 II. Appointment of Class Counsel

5 Rule 23(g)(1) of the Federal Rules of Civil Procedure provides
6 in part:

7 Unless a statute provides otherwise, a court that
8 certifies a class must appoint class counsel. In
appointing class counsel, the court:

9 (A) must consider:

10 (i) the work counsel has done in identifying or
investigating potential claims in the action;

11 (ii) counsel's experience in handling class
12 actions, other complex litigation, and the
types of claims asserted in the action;

13 (iii) counsel's knowledge of the applicable
14 law; and

15 (iv) the resources that counsel will commit to
16 representing the class;

17 (B) may consider any other matter pertinent to
counsel's ability to fairly and adequately represent
18 the interests of the class;

19 (C) may order potential class counsel to provide
information on any subject pertinent to the
20 appointment and to propose terms for attorney's fees
and nontaxable costs;

21 (D) may include in the appointing order provisions
about the award of attorney's fees or nontaxable
22 costs under Rule 23(h); and

23 (E) may make further orders in connection with the
24 appointment.

25 Fed. R. Civ. P. 23(g)(1).

26 Defendants do not oppose the appointment of Plaintiffs'
27 counsel, the law firms of Lewis, Feinberg, Lee, Renaker & Jackson,

1 P.C. and Rukin Hyland Doria & Tindall LLP, as class counsel. Based
2 on the material submitted by Plaintiffs, the Court finds that
3 Plaintiffs' counsel meet the requirements for appointment of class
4 counsel under Rule 23(g).

5 CONCLUSION

6 For the foregoing reasons, the Court GRANTS Plaintiffs' motion
7 for class certification and appointment of class counsel. The
8 hearing scheduled for July 3, 2008 is VACATED.

9 IT IS SO ORDERED.

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11 Dated: 6/26/08



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CLAUDIA WILKEN
United States District Judge